Filed 10/25/16 Marriage of Stupp and Schilders CA1/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re the Marriage of STEVEN STUPP and ANNEMARIE SCHILDERS.	
STEVEN STUPP, Respondent, v. ANNEMARIE SCHILDERS, Appellant.	A146733, A147151 (San Mateo County Super. Ct. No. FAM0110799)

In these consolidated appeals, appellant Annemarie Schilders (Schilders) asks us to vacate two postjudgment family court orders: an October 20, 2015 order striking a statement of disqualification of Judge Susan Greenberg, and an October 26, 2015 order addressing several different issues in this marital dissolution.

Respondent Steven Stupp (Stupp) has moved to dismiss the appeals, arguing that the orders are moot or otherwise not appealable. We agree, and therefore we will dismiss the appeals.

FACTUAL AND PROCEDURAL BACKGROUND

The postjudgment orders challenged in this appeal were issued in proceedings concerning the dissolution of a marriage and the custody of the parties' young child. Although the marriage has been dissolved, custody remains subject to temporary orders. The underlying case, which has been pending in the family court since September 2010, when the child was a few months old, has been highly contentious. As of February 3,

2016, the register of actions extended to 86 pages. And since June 2014, when Schilders appealed the entry of a stipulated judgment, motions to vacate the judgment, and an order modifying the judgment,[1] Schilders has initiated more than ten appeals. We decided two of the appeals earlier this year in unpublished opinions.[2]

In this opinion we address Schilders's appeals of two separate postjudgment orders issued by the family court in October 2015. We granted Schilders's unopposed application to consolidate the appeals and file a corrected opening brief. We incorporate the pertinent factual and procedural background for each of the appealed orders in the discussion that follows.[3]

DISCUSSION

A. *The October 20, 2015 Order*

On October 14, 2015, at a scheduled hearing on a request for attorneys fees that Stupp had filed some months earlier, attorney Ester Adut appeared for Schilders and asked Judge Susan Greenberg, who was then assigned to the matter, to recuse herself because of a failure to disclose certain contributions to her election committee. Later in the hearing, Adut served Judge Greenberg with a "Statement of Disqualification of Judge Susan L. Greenberg." In an order filed on October 20, 2015, Judge Greenberg struck the statement of disqualification on the grounds that it had not been properly verified, and recused herself from further participation in the matter "in furtherance of the interests of justice and judicial efficiency."

Schilders appeals the October 20, 2015 order in case A147151, asking us to vacate the portion of the order striking the statement of disqualification, but not asking to undo Judge Greenberg's recusal.

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[1] *Stupp v. Schilders* (Mar. 25, 2016, A142302) [nonpub. opn.].

[2] *Stupp v. Schilders* (Mar. 25, 2016, A142302) [nonpub. opn.] and *Stupp v. Schilders* (Mar. 25, 2016, A143186) [nonpub. opn.].

[3] We grant Stupp's unopposed request to take judicial notice of a document in the superior court's file and documents contained in our files of related appeals in this matter.

Stupp moves to dismiss the appeal, contending that because the order concerns the disqualification of a judge, it is reviewable only by a writ of mandate, pursuant to Code of Civil Procedure section 170.3, subdivision (d),[4] and is not an appealable order. We agree. A claim that the trial court erred in striking a motion to disqualify is not cognizable on appeal, and may be reviewed only by a writ of mandate sought within 10 days after service to parties of notice of the decision. (*People v. Panah* (2005) 35 Cal.4th 395, 444; see also 1 Karplus et al., Cal. Judges Benchbook: Civ. Proceedings Before Trial (2d ed. 2008) Disqualification of a Judge, § 7.37, p. 406 ["Once a judge has ordered a statement of disqualification stricken, the aggrieved party may seek a writ of mandate to reinstate the statement and have the challenge considered on its merits. *Hollingsworth v. Superior Court* (1987) 191 Cal.App.3d 22, 26."].) Schilders could have sought writ review of the October 20 order, but elected not to do so.[5]

Schilders argues that the October 20 order striking the statement of disqualification is void and is therefore appealable. The right to appeal is entirely statutory (*Dana Point Safe Harbor Collective v. Superior Court* (2010) 51 Cal.4th 1, 5), yet Schilders cites no statutory authority that supports her claim of appealability. In her notice of appeal, Schilders asserts that the October 20 order is appealable as an order after judgment under section 904.1, subdivision (a)(2) and as an order or judgment under section 904.1, subdivisions (a)(3) through (13), but she neither repeats nor supports those assertions in her opening brief on appeal or in her opposition to Stupp's motion to dismiss. Furthermore, none of the cases that she cites in her opposition stand for the proposition that an order like the one at issue here, which is not a final judgment, which does not affect or relate to an underlying appealable judgment, and which is not

[4] All subsequent unspecified statutory references are to the Code of Civil Procedure.

[5] Notice of the October 20, 2015 order was served on Schilders and her counsel by mail on October 20. Schilders filed her notice of appeal from the order on December 21, 2015. Therefore, even if we regarded her notice of appeal as a writ petition, Schilders failed to meet the statutory 10-day deadline.

otherwise appealable, becomes appealable if it is void. (See *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 651-654 (*Lakin*) [to be appealable as a postjudgment order under section 904.1, subdivision (a)(2), the order must affect an underlying appealable judgment or relate to its enforcement]; see also *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 200 (*Varian*) ["a void judgment or order is appealable *if that judgment or order is otherwise appealable*" (italics added)].)

Because the October 20 order is not appealable, we will dismiss the appeal in A147151.

B. *The October 26, 2015 Order*

After a hearing held on September 24, 2015, at which Schilders was present, an order was entered on October 26, 2015, with six enumerated provisions reflecting orders pronounced at the hearing by the family court. First, the court denied Schilders's request to discharge her guardian ad litem, who had recently been appointed by the family court, and whose appointment was subsequently vacated. Second, the court ordered Schilders to pay her guardian ad litem $10,000 to retain independent counsel, from her share of a 401k plan that was awarded to her during the dissolution. Third, the court denied without prejudice Stupp's request for an independent medical examination of Schilders. Fourth, the court ordered Schilders to provide Stupp's attorneys documentation regarding her transportation to the hospital on August 19, 2015, and any subsequent treatment that day. Fifth, the court ordered the parties to attend a mediation with Family Court Services on October 15, 2015, which the guardian ad litem was to attend in Schilders's stead if she was unable to attend. Finally, the court ordered that Schilders's daytime visitation with the child was to be supervised.

Schilders appeals the October 26, 2015, order in case A146733. Although she asks us to reverse the order in its entirety, it clear from her opening brief on appeal and from her opposition to Stupp's motion to dismiss that her challenge concerns just two portions of the order: the requirement of supervised visitation and the requirement that she provide documentation about her August 19, 2015 trip to the hospital.

We begin with the two portions of the order that Schilders challenges. The requirement of supervised visitation is moot, because it was superseded by a 2016 order for unsupervised visitation, and we cannot grant Schilders any further relief on the issue of supervised visitation. (*Eye Dog Foundation v. State Board of Guide Dogs for the Blind* (1967) 67 Cal.2d 536, 541 (*Eye Dog Foundation*).) In any event, the October 26 order was a temporary custody order, and therefore not appealable. (*Lester v. Lennane* (2000) 84 Cal.App.4th 536, 558.)

Schilders claims that the order requiring her to produce documents about her hospitalization is appealable as an order after judgment under section 904.1, subdivision (a)(2), and "as a collateral final order directing the performance of an act and involv[ing] issues other than those decided by the judgment." Stupp argues that it is not appealable as an order after judgment or as a collateral final order, because it represents an "interim step[ ] in a long process of considering postjudgment custody modifications."[6] We agree with Stupp.

Section 904.1, subdivision (a)(2) permits the immediate appeal of some post-judgment orders, but "this does not literally mean that *any* order after a previous judgment is appealable. To be appealable, a postjudgment order must meet certain requirements. [Citation.] Some postjudgment orders are not appealable because, 'although following an earlier judgment, [they] are more accurately understood as being

[6] Stupp also argues that the order is not appealable because Schilders's challenge to the order was denied in connection with her writ petition in a related matter, A146301. We reject this argument. The writ petition in that case challenged the family court's October 26, 2015 orders, and we issued an alternative writ directing the family court to vacate the provisions concerning the guardian ad litem or show cause. The family court vacated those provisions, and we issued an order discharging the alternative writ and otherwise denying the petition. Contrary to Stupp's contention, we did not deny the petition in a written opinion following the issuance of an alternative writ. Furthermore, we did not give any statement of our reasons for denying the petition. Therefore, our denial of the petition with respect to portions of the order that are not concerned with the appointment of the guardian ad litem are not res judicata or law of the case, and our Supreme Court's opinion in *Kowis v. Howard* (1992) 3 Cal.4th 888, 891, does not preclude further consideration of the issue on appeal.

preliminary to a later judgment, at which time they will become ripe for appeal. [¶] . . . [¶] . . . [Such post judgment orders lack] finality in that they [are] also preparatory to later proceedings.' " (*In re Marriage of Ellis* (2002) 101 Cal.App.4th 400, 403, citing and quoting *Lakin, supra,* 6 Cal.4th at pp. 651-653.)

Under the collateral order doctrine, an order is directly appealable when it is final as to a matter that is collateral to the general subject of the litigation, and the order directs the payment of money or the performance of an act. (*In re Marriage of Skelley* (1976) 18 Cal.3d 365, 368.) "If an order is ' "important and essential to the correct determination of the main issue" ' and ' "a necessary step to that end," ' it is not collateral." (*San Joaquin Dept. of Child Support Services v. Winn* (2008) 163 Cal.App.4th 296, 300, quoting *Steen v. Fremont Cemetery Corp.* (1992) 9 Cal.App.4th 1221, 1227.)

The order requiring Schilders to provide information about her trip to the hospital and treatment is not final and it does not concern a collateral matter. As we explain in the following paragraphs, the record shows that the order is preparatory to proceedings determining custody, a central issue in this case, and one that has been highly contested and remains subject to temporary orders

Stupp initially requested the information at a September 15, 2015 hearing on a motion he made for modification of child custody and visitation. Stupp's counsel informed the court that Stupp's health insurance company had reported that Schilders was taken by ambulance to a hospital on August 19th. Stupp's counsel said that Schilders "previously has three, 5150 holds and we would like the court to inquire as to protection of the child what was the reason for the most recent ambulance." The family court judge replied, "I do need to inquire into that." Stupp's counsel returned to the subject of the ambulance trip later in the hearing, and asked the court to order Schilders to provide information about the ambulance trip, "because this child obviously is at risk." The court responded, "This child obviously is at risk. This child has been at risk for a long time. And I would like to reset this for a week or two from now." The hearing was then continued to September 24.

On September 21, Stupp filed a notice of intent to seek emergency orders on September 24, including an order that Schilders provide "documentation and any other information related to her ambulance transport and subsequent treatment, if any, on August 19, 2015."

Schilders appeared at the September 24 hearing, with Riffle, the guardian ad litem, whose appointment had not yet been vacated. With respect to the ambulance trip, Riffle stated, "Miss Schilders has advised me on the day that she was suffering a migraine headache, she walked into her kitchen and there was water leaking from a defective dishwasher. She slipped in her kitchen, fell and hit her head. She was alone. She called 911. And she was taken to Sequoia Hospital, checked out and released."

Stupp's counsel then discussed the history of the proceedings, including Schilders's failure to appear at hearings and her unilateral cancellation of appointments with Family Court Services, and the repeated delays in determining custody in a proceeding that had been pending for several years, since the couple's child was less than a year old. Stupp's counsel argued that in light of Schilders's known health issues, the family court needed additional information, including information about the August hospitalization, to craft appropriate custody and visitation orders.

A meeting with Family Court Services had been scheduled for October 15, and a return date for custody and visitation was set for November 5, by which time the court expected to have a report from Family Court Services. The court ordered that information about the ambulance trip to Sequoia Hospital be procured within a week, by October 1, and Schilders stated on the record that she could provide it.[7]

We conclude that, because the order requiring Schilders to provide documents about her ambulance trip and treatment on August 19, 2015, is preparatory to proceedings determining custody, which is a central issue in this case, the order is not appealable under section 904.1, subdivision (a)(2), or under the collateral order doctrine.

[7] The record does not reflect any objection to, or motion to set aside, the requirement that Schilders provide documents, either in response to the order pronounced on September 24, or in response to the October 26 order.

We briefly discuss the remaining provisions in the October 26 order, which concern the guardian ad litem and the denial of Stupp's request for an independent medical examination. Schilders recognizes that the family court has already vacated the portions of the order concerning the appointment of a guardian ad litem for Schilders.[8] Because we cannot grant Schilders any further relief on these portions of the order, we will dismiss her appeal as to them as moot. (*Eye Dog Foundation*, *supra*, 67 Cal.2d at p. 541.)

Schilders does not claim to be aggrieved in any way by the denial of Stupp's request for an independent medical examination. (See § 902 ["Any party aggrieved may appeal"].) Indeed, she does not mention this portion of the October 26 order anywhere in her opening brief on appeal, or in her opposition to Stupp's motion to dismiss. We will therefore dismiss her appeal as to that portion of the order.

In opposing Stupp's motion to dismiss, Schilders argues that the October 26 order is void on various grounds, and is therefore appealable, but she cites no authority holding that an order like the one here, which is not appealable as a postjudgment order or a collateral final order, becomes appealable by virtue of being void. (See *Varian*, *supra*, 35 Cal.4th at p. 200 ["a void judgment or order is appealable *if that judgment or order is otherwise appealable*" (italics added)].) As it happens, a case like the one before us shows why it would be poor policy to have any postjudgment order be appealable. The nature of family law is such that there are often postjudgment proceedings. If we adopted Schilders's position, then every order issued after a judgment would be appealable, regardless of whether it was preparatory to further proceedings that will lead to an appealable order. Similarly, if every void order were appealable, then any party who was displeased by any ruling, pre or postjudgment, could file an appeal on the grounds that the order was void. This would greatly delay the resolution of family law proceedings. (See Fam. Code, § 271, subd. (a) [recognizing "policy of the law to promote settlement of

[8] The family court vacated those portions of the order in response to an alternative writ issued by this court in case A146301.

litigation and, where possible, to reduce the cost of litigation by encouraging cooperation between the parties and attorneys"].)

Because the provisions of the October 26, 2015 order are moot or otherwise not appealable, we will dismiss the appeal in case A146733.

DISPOSITION

Stupp's unopposed request for judicial notice is granted. Appeals A146733 and A147151 are dismissed. Respondent shall recover his costs on these consolidated appeals.

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Miller, J.

We concur:

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Kline, P.J.

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Stewart, J.

A146733, A147151, *Stupp v. Schilders*